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UNITED STATES DISTRICT COURT  
DISTRICT OF ARIZONA

Fernando Gastelum,

Plaintiff,

vs.

New Crescent Investments, LLC

Defendant.

No. 2:17-cv-02560-JAT

**DEFENDANT NEW CRESCENT  
INVESTMENTS, LLC's RESPONSE IN  
OPPOSITION TO PLAINTIFF'S  
MOTION FOR PARTIAL SUMMARY  
JUDGMENT**

Pursuant to Fed. R. Civ. P. 56 and LRCiv. 56.1, Defendant New Crescent Investments, LLC ("Defendant" or "New Crescent") submits this Response in Opposition to plaintiff Fernando Gastelum's Motion for Partial Summary Judgment. This Response is supported by the following Memorandum of Points and Authorities, and the Controverting Statement of Facts ("CSOF") filed concurrently herewith.

**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. FACTUAL BACKGROUND**

As relevant to the present motion, this matter involves a claim by Plaintiff Fernando Gastelum ("Plaintiff" or "Gastelum") that Defendant has violated Title III of the Americans with Disabilities Act, 42 U.S.C. § 12182 *et seq.* ("Title III"), because the website for a hotel owned and operated by Defendant, the Sheraton Crescent hotel located at 2620 West Dunlap Avenue, Phoenix, AZ 85021 (the "Hotel") does not comply with 28 C.F.R. § 36.302.

Specifically, Plaintiff alleges that he visited a third party website, [www.booking.com](http://www.booking.com), and the Hotel's own website, [www.sheratoncrescent.com](http://www.sheratoncrescent.com), and that the websites failed to provide accessibility information for the Hotel as required by 28 C.F.R. §36.302(e)(ii). Plaintiff also alleges that he telephoned the Hotel and spoke with a clerk named Ashley and she stated that the Hotel is compliant with the Americans with Disabilities Act ("ADA"). Plaintiff claims that he visited the Hotel and found that it was not fully compliant with the ADA, and that therefore Defendant violated 28 C.F.R. § 36.302 because it misrepresented the accessibility features of the Hotel.

Defendant does own and operate the Hotel. (Defendant's Controverting Statement of Facts (CSOF) ¶19). Defendant operates the Hotel as a franchise of Starwood Hotels, its franchisor. (CSOF ¶19). Starwood Hotels is in turn a wholly owned subsidiary of Marriott International. (CSOF ¶19). As far as Defendant is aware, the Hotel is fully compliant with the ADA. (CSOF ¶26).

Defendant has no control over the [www.booking.com](http://www.booking.com) website and has no say in what content is listed on that website regarding the Hotel. (CSOF ¶20). Defendant similarly has no way of preventing that website from listing information relating to the Hotel. (CSOF ¶20).

The website [www.sheratoncrescent.com](http://www.sheratoncrescent.com) is a website that is owned and operated by Marriott International. (CSOF ¶21). Upon accessing the Hotel's website, [www.sheratoncrescent.com](http://www.sheratoncrescent.com), there is a link at the bottom of the home page to "Accessibility Information." (CSOF ¶22). Upon clicking on that link, the website user is directed to the following URL: [http://www.starwoodhotels.com/sheraton/property/features/index.html?propertyID=102&language=en\\_US&ES=LPS\\_102\\_EN\\_SI\\_WEST\\_NAD](http://www.starwoodhotels.com/sheraton/property/features/index.html?propertyID=102&language=en_US&ES=LPS_102_EN_SI_WEST_NAD). (CSOF ¶22). That page in turn contains a tab "Accessibility." (CSOF ¶23). That tab when opened contains the following information:

This hotel is committed to making our facilities, amenities and services accessible to guests with disabilities.

1 ACCESSIBLE PUBLIC SPACES

2 Public entrance

3 Service animals welcome

4 Accessible route from public entrance to registration

5 Accessible route from public entrance to guest rooms

6 Accessible route from public entrance to restaurant

7 Accessible route from public entrance to meeting  
room/ballroom

8 Accessible route from public entrance to swimming pool

9 Accessible route from public entrance to business center

10 Valet parking

11 Self-parking area for cars

12 Self-parking area for vans

13 Swimming pool

14 Business center

15 Assistive listening devices for meetings

16 ACCESSIBLE GUEST ROOMS

17 Roll-in showers

18 Bathtubs with grab bars

19 Transfer showers

20 Visual fire alarm

21 Portable communications kits containing visual alarms &  
22 notification devices

23 Mobility-accessible doors with at least 32 inches of clear door  
24 width

25 Portable tub seats

26 TTY (Text Telephone Device)

27 Televisions with closed captioning for the hearing impaired

28 Clarifying Note: certain areas of the hotel are not fully  
accessible to guests with disabilities.

1 PUBLIC SPACES

2 Complimentary wheelchair-accessible transportation

3 Accessible route from public entrance to fitness center

4 Registration desk

5 Fitness center

6 We will attempt to make reasonable modifications to our  
7 policies, practices, or procedures for guests with disabilities in  
8 order to provide them with access to the facilities and services  
9 our hotel has to offer.

10 Questions about the accessible facilities and services offered  
11 should be directed to the hotel at (1)(602) 943-8200. (CSOF  
12 ¶23).

13 Defendant denies that it employs, or has ever employed, any employee named  
14 Ashley. (CSOF ¶25). Defendant contends that the Hotel is compliant with the ADA in  
15 regards to the characteristics alleged by Plaintiff to not be compliant and that as far as  
16 Defendant is aware, the Hotel fully complies with the ADA in regards to its physical  
17 characteristics. (CSOF ¶26). Therefore, any representation by an employee to that the  
18 Hotel complies with the ADA would be truthful. (CSOF ¶26). Defendant has no record of  
19 Plaintiff ever contacting the Hotel, visiting the Hotel, or attempting to book a room at the  
20 Hotel. (CSOF ¶27).

21 **II. SUMMARY JUDGMENT STANDARD**

22 Summary judgment is proper when “the movant shows that there is no genuine  
23 issue as to any material fact and that the movant is entitled to judgment as a matter of law.”  
24 Fed. R. Civ. P. 56(a). Conversely, “[w]here reasonable minds could differ on the material  
25 facts at issue, summary judgment is not appropriate.” *Basic Mgmt. v. United States*, 569  
26 F.Supp.2d 1106, 1113 (9th Cir. 2008). Similarly, “if a rational trier of fact might resolve  
27 the issue in favor of the nonmoving party, summary judgment must be denied.” *T.W. Elec.*  
28 *Serv., Inc. v. Pac. Elec. Contractors Ass’n.*, 809 F.2d 626, 631 (9th Cir. 1987) (citing  
*Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89  
L. Ed. 2d 538 (1986)). *See also Chew v. Gates*, 27 F.3d 1432, 1453 (9th Cir. 1994) (holding

1 that because whether the use of LAPD dogs, as trained and deployed, constitutes the use of  
2 deadly force cannot be decided as a matter of law, summary judgment must be denied).

3 In this case, because reasonable minds could, and in fact should, resolve the present  
4 issue in favor of Defendant rather than Plaintiff, and reasonable minds could certainly  
5 differ regarding whether Plaintiff can prevail on his claim that Defendant has violated 28  
6 C.F.R. §36.302, Plaintiff's motion for partial summary judgment should be denied.

7 **III. PLAINTIFF CANNOT ESTABLISH THAT DEFENDANT HAS VIOLATED**  
8 **THE ADA AS A MATTER OF LAW**

9 **A. Requirements of 28 C.F.R. §36.302.**

10 28 C.F.R. §36.302(e) states, in relevant part, that:

11 (1) Reservations made by places of lodging. A public accommodation that  
12 owns, leases (or leases to), or operates a place of lodging shall, with respect  
13 to reservations made by any means, including by telephone, in-person, or  
14 through a third party—

15 (i) Modify its policies, practices, or procedures to ensure that individuals  
16 with disabilities can make reservations for accessible guest rooms during the  
17 same hours and in the same manner as individuals who do not need  
18 accessible rooms;

19 (ii) Identify and describe accessible features in the hotels and guest rooms  
20 offered through its reservations service in enough detail to reasonably permit  
21 individuals with disabilities to assess independently whether a given hotel or  
22 guest room meets his or her accessibility needs...

23 28 CFR 36.302 (e)(1)(i)-(ii).

24 The official Guidance to the regulation sets forth the scope of what regulators  
25 anticipated being required to comply with 28 C.F.R. §36.302(e):

26 Because of the wide variations in the level of accessibility that travelers will  
27 encounter, the Department cannot specify what information must be included  
28 in every instance. For hotels that were built in compliance with the 1991  
Standards, it may be sufficient to specify that the hotel is accessible and, for  
each accessible room, to describe the general type of room (e.g., deluxe  
executive suite), the size and number of beds (e.g., two queen beds), the type  
of accessible bathing facility (e.g., roll-in shower), and communications  
features available in the room (e.g., alarms and visual notification devices).  
Based on that information, many individuals with disabilities will be  
comfortable making reservations.

For older hotels with limited accessibility features, information about the  
hotel should include, at a minimum, information about accessible entrances  
to the hotel, the path of travel to guest check-in and other essential services,

1 and the accessible route to the accessible room or rooms. In addition to the  
 2 room information described above, these hotels should provide information  
 3 about important features that do not comply with the 1991 Standards. For  
 4 example, if the door to the "accessible" room or bathroom is narrower than  
 5 required, this information should be included (e.g., door to guest room  
 6 measures 30 inches clear). This width may not meet current standards but  
 7 may be adequate for some wheelchair users who use narrower chairs. In  
 8 many cases, older hotels provide services through alternatives to barrier  
 9 removal, for example, by providing check-in or concierge services at a  
 10 different, accessible location.

11 75 FR 56236.

12 Although there is a dearth of cases addressing how detailed a reservation system's  
 13 description of an accessible room's features must be, there is one case that has dealt with  
 14 the issue, *Barnes v. Marriott Hotel Servs.*, 2017 U.S. Dist. LEXIS 22588 (N.D. Cal. Feb.  
 15 16, 2017). In *Barnes*, the plaintiff brought an action against Marriott Hotels alleging the  
 16 Marriott reservation system did not state with particularity the accessible features of the  
 17 room. The Court found that Marriott's reservation system was compliant with §36.302:

18 The Hotel, which was constructed to be compliant with the 1991 Standards,  
 19 provides descriptions of accessible features on its website that include the  
 20 level of detail proposed by the ADA Guidance document. See Dkt. No. 38,  
 21 Plaintiff's Request for Judicial Notice (showing documents from Marriott's  
 22 website stating, "[a]ccessible guest rooms have a 32 inch wide opening," and  
 23 listing the areas of the hotel that are accessible, as well as describing  
 24 "Accessible Room Features" for individual room types: "[t]his room type  
 25 offers mobility accessible rooms[;] [t]his room type offers accessible rooms  
 26 with roll in showers[.]"). According to the DOJ guidance document  
 27 interpreting the ADA Accessibility Guidelines, which courts have held is  
 28 "entitled to substantial deference," *Kohler v. Presidio Int'l, Inc.*, 782 F.3d  
 1064, 1069 (9th Cir. 2015), these descriptions and this level of detail is  
 appropriate and acceptable. The court is thus not persuaded that Marriott's  
 website violates Section 36.302(e) for any failure to identify and describe  
 accessibility features." *Id.* at \*28-29.

Based on the foregoing, the court held that the hotel met the requirements of the  
 regulation by providing minimal information on the room, e.g. whether it was mobility  
 accessible or had a roll-in shower, and the hotel was not required to list more specific  
 features like counter heights. *Id.*

**B. The Hotel's website complies with 29 C.F.R. §36.302(e)(ii).**

Contrary to the direction provided by the official guidance to the regulation and the  
 district court in *Barnes*, Plaintiff provides absolutely no support for his assertion that a

1 hotel website must contain all, or even any, of the items that he alleges the Hotel's website  
2 is lacking, such as whether drinking fountains comply with §211 or washing machines and  
3 clothes dryers comply with §§214 and 611 of the 2010 Accessibility Standards. Rather, all  
4 the regulation itself requires is that the hotel "[i]dentify and describe accessible features in  
5 the hotels and guest rooms offered through its reservations service *in enough detail to*  
6 *reasonably permit individuals with disabilities to assess independently* whether a given  
7 hotel or guest room meets his or her accessibility needs." 28 C.F.R. § 36.302(e)(ii)  
8 (emphasis added). Nowhere does the regulation or any guidance state that every single  
9 accessibility feature needs to be listed or that specific reference to the applicable regulation  
10 or 2010 Accessibility Standard needs to be made on the website. Indeed, to list such  
11 information would in all likelihood not assist a reasonable person in determining the  
12 accessibility of a hotel and would lead to more confusion than clarity for someone who is  
13 not legally trained.

14 Moreover, the only available guidance on the subject directly contradicts Plaintiff's  
15 argument, because it makes clear that not every accessibility feature does need to be listed,  
16 and that it is sufficient to either simply list the room type, size and number of beds, type of  
17 accessible bathing facility, and communications features available in the room, for hotels  
18 that are compliant with the 1991 Standards; or to list information about accessible  
19 entrances to the hotel, the path of travel to guest check-in and other essential services, the  
20 accessible route to the accessible room, and information about important features that do  
21 not comply with the 1991 Standards, for those hotels that are not fully compliant with the  
22 1991 Standards.

23 Based on the foregoing, there is no basis to conclude that Defendant is not in  
24 compliance with 28 C.F.R. § 36.302(e)(ii) because its website does not list all of the  
25 information identified by Plaintiff, or that there is any legal requirement that its website  
26 contain all of the information identified by Plaintiff, or any information in addition to that  
27 already contained on the Hotel's website.

28



1 To that end, in this case, the Hotel's website meets the standards set forth by the  
 2 Court in *Barnes* and in the official guidance to the regulation. The website lists all of the  
 3 accessible public spaces (i.e., accessible route from public entrance to registration,  
 4 accessible route from public entrance to guest rooms, accessible route from public entrance  
 5 to restaurant, accessible route from public entrance to meeting room/ballroom, accessible  
 6 route from public entrance to swimming pool, accessible route from public entrance to  
 7 business center, etc.). It also lists that accessible guest rooms have roll-in showers,  
 8 bathtubs with grab bars, transfer showers, visual fire alarms, portable communications kits  
 9 containing visual alarms & notification devices, mobility-accessible doors with at least 32  
 10 inches of clear door width, portable tub seats, TTY (Text Telephone Device), and  
 11 televisions with closed captioning for the hearing impaired. Moreover, when an individual  
 12 proceeds to book a room, the accessible room types that are available are provided.  
 13 (CSOF ¶25).

14 This level of detail fully complies with the guidance to the regulation, as it includes  
 15 the room type, size and number of beds, type of accessible bathing facility,  
 16 communications features available in the room, information about accessible entrances to  
 17 the hotel, the path of travel to guest check-in and other essential services, and the  
 18 accessible route to the accessible room. Although the website does not list information  
 19 about important features that do not comply with the 1991 Standards, this is because there  
 20 are no such features. Therefore, even if the Hotel does not fully comply with the 1991  
 21 Standards (which Defendant disputes), because there are no important features of the Hotel  
 22 that are not compliant with such Standards, the Hotel's website meets the standards set  
 23 forth in both *Barnes* and the official guidance to the regulation, and therefore complies  
 24 with 28 C.F.R. §36.302(e)(ii).

25 Consequently, there is no basis for finding at all, let alone as a matter of law, that  
 26 Defendant has violated the ADA by not listing on its website the information that Plaintiff,  
 27 without any legal support, alleges is missing from the website, as there is simply no  
 28 requirement that all such information be contained on the website. Indeed, contrary to



1 Plaintiff's arguments, if anything it can be properly determined as a matter of law that the  
 2 Hotel's website is compliant with the applicable regulations.

3 **C. Defendant is not responsible for the information contained on the**  
 4 **booking.com website.**

5 Although Plaintiff alleges that the website [www.booking.com](http://www.booking.com) does not comply with  
 6 28 C.F.R. §36.302, Defendant cannot be liable for any such failure to comply, as  
 7 Defendant has no control over the site or the information contained on the site and it is  
 8 owned and operated from an entity that has no relationship to Defendant. Although 28  
 9 C.F.R. §36.302(e)(1) does reference a third party, this can only reasonably refer to when a  
 10 hotel owner or operator contracts with a third party to operate its reservation system, and  
 11 not a completely independent third party over which an owner or operator has no control  
 12 whatsoever.

13 To that end, the official guidance to the regulation makes clear the scope of the  
 14 duties of an owner and operator in regards to third party sites:

15 Hotels and other places of lodging that use third-party reservations services  
 16 must make reasonable efforts to make accessible rooms available through at  
 17 least some of these services and must provide these third-party services with  
 18 information concerning the accessible features of the hotel and the accessible  
 19 rooms. To the extent a hotel or other place of lodging makes available such  
 20 rooms and information to a third-party reservation provider, but the third  
 21 party fails to provide the information or rooms to people with disabilities in  
 22 accordance with this section, the hotel or other place of lodging will not be  
 23 responsible.

24 75 FR 56236, 56273-56274.

25 In this case, Defendant makes available to all third party booking sites the  
 26 accessibility features of the Hotel. Indeed, all a third party site would need to do is access  
 27 the Hotel's own site to obtain a list of the accessibility features. Therefore, Defendant  
 28 cannot be liable for [www.booking.com](http://www.booking.com)'s failure, if any, to list the accessibility features of  
 the Hotel.

**D. Plaintiff cannot establish as a matter of law that Defendant made any misrepresentations.**

Finally, Plaintiff cannot establish, let alone as a matter of law, that Defendant made any misrepresentation to Plaintiff regarding the compliance of the Hotel with the ADA. To that end, Plaintiff alleges that he spoke with a reservations clerk named Ashley when he called the Hotel. Defendant denies ever employing any reservations clerk or other employee named Ashley at the Hotel, and therefore disputes that any such person provided Plaintiff any information at all regarding the Hotel. Moreover, Defendant contends that the physical aspects of the Hotel are compliant with the ADA and that therefore any representation made by an employee of the Hotel that it was ADA compliant would not have been a misrepresentation. Therefore, Plaintiff cannot establish as a matter of law that any employee of Defendant made any misrepresentations to him regarding the ADA accessibility of the Hotel.

**I. CONCLUSION**

For the foregoing reasons, New Crescent respectfully requests that this Court deny Plaintiff's Motion for Partial Summary Judgment in its entirety.

DATED this 8<sup>th</sup> day of November, 2017.

**LEWIS BRISBOIS BISGAARD & SMITH LLP**

By /s/ Erica K. Rocush

Erica K. Rocush  
Attorneys for CL West Management

**CERTIFICATE OF SERVICE**

I hereby certify that on November 8, 2017, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing and deposited the same in the U.S. Mail to the following CM/ECF registrants:

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